

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

BRANDYWINE AFFILIATE, NCCEA/DSEA/NEA
Suite 205
Prices Corner Center
Kirkwood Highway
Wilmington, DE. 19808

Charging Party,

v.

BRANDYWINE SCHOOL DISTRICT BOARD OF
EDUCATION
Pennsylvania Avenue
Claymont, DE. 19703

Respondent.

U.L.P NO. 85-06-005

DECISION

The dispute presented for resolution results from alleged unfair labor practices in violation of sections 4007(a)(1), (3), (5) and (8) of the Public School Employment Relations Act, 14 Del.C Chapter 40 (Supp. 1982), hereinafter referred to as the Act. The charge was filed on June 26, 1985 by the Brandywine Affiliate, NCCEA/DSEA/NEA (hereinafter the Association) against the Board of Education of the Brandywine School District (hereinafter District). The District filed its answer on July 8, 1985, and the Association filed its response on July 25, 1985. An informal conference was held by the Executive Director of the Public Employment Relations Board (hereinafter PERB) with authorized representatives of the parties on August 8, 1985. Hearings were held on September 18, 1985 and November 27, 1985. A briefing schedule was established by the parties and the final brief was filed by the Association on November

13, 1985.

FACTS

The New Castle County School District was created in 1978 by a Federal District Court order consolidating eleven independent school districts into one single district, that being the New Castle County School District. On July 1, 1981, with the approval of the District Court and in accord with the requirements of a reorganization plan developed by the State School Board, the New Castle County School District was reorganized into four smaller independent districts, one of which was the Brandywine School District, respondent in this action. During the summer of 1981, the Brandywine School District entered into collective bargaining with the local education association. During these negotiations the subjects of seniority, lay-off, and recall were discussed and tentative agreement was reached; however, no language reflecting the parties' agreement appeared in the resulting contract. The absence of such language resulted from a July, 1982 decision of the Delaware Supreme Court declaring these, as well as other topics, to be illegal subjects of bargaining under the teachers' collective bargaining law in effect at that time. Colonial School Bd. v. Colonial Affiliate, Del.Supr., 449 A.2d 243 (1982). The District did, however, include language regarding these subjects in its "Teachers Handbook -Policy and Procedures" for the school years 1982-83 and 1983-84.

Negotiations concerning a successor labor agreement commenced in early 1984. Sometime prior to May 1, 1985, the parties reached agreement on the provisions of Article VII, Seniority, Lay-off and

Recall. The parties further agreed that the provisions of Article VII would apply to any lay-offs and recalls which became effective at the end of the 1984-85 school year, even if final agreement on the total contract had not yet been reached. These negotiations ultimately resulted in a collective bargaining agreement for the period September 1, 1984, through August 31, 1987. This was the first contract between the parties in which language concerning seniority, lay-off and recall appeared.

It was during these contract negotiations that the incident giving rise to this unfair labor practice charge occurred. During the 1984-85 school year the Brandywine School District employed 860 teachers, of whom 110 were non-tenured. On or before May 1, 1985, 36 of these non-tenured teachers received termination letters. None of the teachers so effected was placed on the District's recall list. Of the 36 teachers involved, 17 constituted permanent staff and it is only with this limited group that we are here concerned. The decision to terminate these teachers was based upon the recommendations of their respective building principals. These recommendations, solicited by the District Superintendent and approved by the Board of Education, did not rely exclusively on the results of the formal performance evaluation process which was, in most cases, conducted during the course of the school year in accordance with District policy. None of the teachers terminated had received a formal evaluation rating of unsatisfactory during the school term.

Based on its understanding of the recently negotiated Article VII, the Association requested that the District reconsider its decision and place all of the 17 permanent staff teachers on the

recall list. The District reviewed its decision with the result that of the 17 non-tenured teachers affected, 4 were placed on the recall list, two did not qualify for the required certification, and the remaining 11 were, in fact, terminated and not placed on the recall list. Two of these eleven were subsequently rehired and credited with continuous service from their original date of hire with the District. The District advised the Association that it considered its action to be in accord with the requirements of Article VII. Although contract negotiations were in progress, there was no formal attempt to resolve the parties' differing understanding as to the meaning and impact of Article VII, specifically, paragraph 7:4.2.

When the Association requested from the District the names of those non-tenured teachers whose contracts had not been renewed and who had not been placed on the recall list, the District refused, claiming that to disclose the names of such teachers would violate their individual right to personal privacy under 29 Del.C. section 10002(d)(1).

As a result of these actions, the unfair labor practice charge was filed.

POSITIONS OF THE PARTIES

ASSOCIATION

The Association's basic position is that the District unilaterally altered the status quo during the term of the collective bargaining agreement. In order to establish the status quo, the

Association relies primarily upon Article 7, Seniority, Lay Off and Recall, specifically section 7, entitled Miscellaneous, at paragraph 7:4.2, which states:

7.4.2: Employees who resign or have been dismissed for any reason other than reduction in force are not subject to the provisions of this Article.

Nothing in this Article shall apply to an individual on a temporary contract or in any way serve to extend the employment of such individuals except as provided in Section 7:3.7.

The Association claims that paragraph 7:4.2 represents an almost exact duplication of Article XV, Lay-off and Recall, specifically sections 15:10 and 15:12 of the prior New Castle County School District Agreement, which state:

15.10 Employees who resign or have been dismissed for any reason other than reduction in staff are not subject to provisions of this article.

15:12 Nothing in this article shall apply to an individual on a temporary contract or in any way serve to extend the employment of such individuals, except as provided in Section 15:15.

Of critical importance to the Association's reliance on paragraph 7:4.2 is the existence of a past practice which it claims existed in the predecessor New Castle County School District and continued by the Brandywine School District since its creation in July, 1981. The alleged practice was the placement of all non-tenured teachers who were terminated at year end on the recall list

unless the annual performance appraisal process had resulted in a rating of unsatisfactory. The Association maintains that this past practice was, in fact, the application of Article XV, 15.10 and 15.12 of the New Castle County School District Agreement and is the current meaning of paragraph 7:4.2 of the Brandywine Agreement.

In building its argument the Association cites the State School Board's 1981 Reorganization Plan for the New Castle County School District, article XV, Negotiations, Section A, Existing Contracts, which states:

The contract in force in FY1981 between the New Castle County School District and exclusive negotiating or bargaining representative shall remain in force until the previously agreed to termination date of each. In the case of any contract expiring after June 30, 1981, (the date on which the NCCSD is dissolved), the Board of Education of each new district shall be the successor to the NCCSD Board of Education in matter relating to employees under such contract who are then deployed to that particular district.

The Association contends that since the New Castle County School District Agreement expired after June 30, 1981 (e.g. August 31, 1981), the Brandywine District, in accord with section A, above, became the successor to the New Castle County School District, as to matters relating to employees under the New Castle County School District contract. The Association further contends that the State's reorganization plan clearly obligated the Brandywine School District to adhere to the provisions of the existing New Castle County labor contract until its date of expiration and that the New Castle County

Agreement also established the status quo to be continued by the parties until a new labor agreement was negotiated. By continuing the alleged past practice, while at the same time adopting essentially the same language in its 1982-83 and 1983-84 policy manuals and then in the collective bargaining agreement retroactively effective September 1, 1984, the Brandywine District became contractually obligated under the provisions of paragraph 7:4.2 to continue the past practice of the New Castle County District.

In further support of its position, the Association points to the current contracts of the other three districts created from the 1981 dissolution of the New Castle County School District, namely the Christina, Red Clay and Colonial School Districts, contending that these contracts contain language similar to section 7:4.2 and that in each of these districts the practice is the same as that which previously existed in the New Castle County School District.

As to the second portion of the charge concerning the District's refusal to supply the names of the nontenured teachers involved, the Association argues that: to release the names of the nontenured teachers does not violate the State's Freedom of Information Act because the Association is not considered a part of the general public, the group to which the personnel exception of section 10002 (d)(1) of the Act is directed; and the Association, as the exclusive bargaining representative, has both statutory and contractual duties and responsibilities to nontenured teachers which cannot be met if the Association is not officially advised of those teachers effected by the District's action.

DISTRICT

In support of its position, the District contends that under the State's tenure law (14 Del.C. sec. 1401 et.seq.) it retains unlimited discretion in determining whether or not to renew the contract of a nontenured teacher and that there is no statutory obligation for it to justify or even discuss its decision, not even with the affected teacher. Maintaining that such a limitation, in derogation of its statutory right, must be found in an express provision of the collective bargaining agreement, the District argues that the language of paragraph 7:4.2 is unambiguous, contains no such limitation and is wholly consistent with its position that nontenured teachers whose contracts the District chooses not to renew, as opposed to those teachers who are laid off, are not subject to the provisions of Article VII and therefore not entitled to be placed on the recall list.

The District contends that since the Association was made aware of the District's position concerning the meaning and impact of paragraph 7:4.2 during the ongoing 1985 contract negotiations, it should now be precluded from relying on this contractual provision upon which there was never mutual understanding. The District contends that the alleged practice in New Castle County, if it existed, was entirely voluntary and not required by contract, was unknown to Brandywine officials and never implemented by the Brandywine District; therefore, it was incumbent upon the Association to disclose such a hidden meaning or interpretation at the time paragraph 7:4.2 was negotiated, if it intended the District to be

bound thereby. Having failed to do so, the plain meaning of the language must prevail.

To further support its position the District relies upon Article 11:1, Board Rights:

11:1.1 - The Board retains all powers, rights, authority, duties, and responsibilities vested in it by the laws and the Constitution of the State of Delaware, and the United States, including but without limiting the generality of the foregoing, the right to:

- (a) manage and administer the District, its facilities and the work activities of its employees;
- (b) determine the educational policies of the District, including the selection of curriculum and the creation or discontinuance of programs;
- (c) hire employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment; and
- (d) dismiss, demote, promote, place, transfer and assign employees.

11:1.2 The exercise of the Board's powers, rights, authority, duties and responsibilities shall be limited only by the specific and express terms of the Agreement, and then only to the extent that such specific and express terms of this Agreement are consistent with the laws and the Constitution of the State of Delaware and the United States.

Finally, the District argues that it cannot be contractually or

otherwise legally bound by a prior practice or contractual provision in a different district the subject matter of which the State Supreme Court in 1982 determined to be an illegal subject of bargaining. Colonial, (Supra.).

Concerning the second portion of the unfair labor practice charge, the District maintains that the individual names were: unnecessary for the union to pursue the matter; otherwise available to the Association simply by its canvassing its members; represented an attempt by the Association to gain that which had been rejected in negotiations; and, the giving of which would have violated the state's privacy laws. 29 Del.C. Chapter 100.

ISSUE

The issues presented for resolution are:

- (1) Whether the Brandywine School District by its unilateral action to not renew the contracts of nontenured teachers who had received other than unsatisfactory performance ratings and to not place these teachers on the recall list committed a midterm unilateral change in the status quo, as negotiated in the collective bargaining agreement, sufficient to constitute an unfair labor practice in violation of sections 4007(a)(1), (3), (5) and (8) of the Act, as alleged?
- (2) Whether the Brandywine School District by its refusal to provide the Association with a list of those non-tenured teachers

effected by the District's action, as set forth in issue (1), above, constituted an unfair labor practice in violation of sections 4007(a)(1), (3), (5) and (8) of the Act, as alleged?

OPINION

ISSUE ONE:

During the course of these proceedings a semantic difference arose between the parties as to the meaning of the terms termination, nonrenewal and layoff. For the purpose of this opinion and decision, the following definitions shall apply:

1. Termination: a severance of the employment relationship including both nonrenewal and layoff.

2. Nonrenewal: the decision of a school district, at its discretion, terminate the employment contract of a nontenured teacher and from which the district incurs no future obligation to the teacher and the teacher incurs no further rights from the district.

3. Layoff: a termination resulting either directly or indirectly from a decrease in enrollment or a decrease in educational services, as determined by the school district, and from which the district incurs a contractual obligation and the affected teacher a correlative right to be placed on the recall list.

This unfair labor practice charge does not contest either the District's unilateral right to determine the qualifications of its teachers or to evaluate their performance. The Association's position is simply that a teacher's performance rating is determined exclusively by the annual performance appraisal process and that this

rating constitutes the sole basis for determining whether or not to renew the contract of a nontenured teacher. Absent an unsatisfactory rating, the year end termination of a nontenured teacher constitutes a lay-off contractually requiring the name of the affected teacher to be placed on the recall list.

It is uncontested that 14 Del.C. Chapter 14, Subchapter II establishes the statutory requirements for the termination of services of teachers at the end of the school year. 14 Del.C. secs. 1410 -1414. With the exception of section 1410, Notice of Intention to Terminate Services, temporary and nontenured teachers are specifically excluded from the provisions of subchapter II. 14 Del.C. sec. 1403. A school district therefore has the statutory freedom to renew or not renew the contract of a nontenured teacher for whatever reason(s) it deems appropriate. Any limitation on this statutory right must be found in either the collective bargaining agreement or in another state statute.

It is important to understand that the issue here is not whether the disputed action taken by the District was in violation of the labor agreement. What is at issue is whether or not the District's action constituted a unilateral change of the status quo sufficient to violate section 4007(a) of the Act, as alleged. In an unfair labor practice proceeding it is of no consequence that the disputed conduct may also constitute a violation of the collective bargaining agreement. While an unfair labor practice is statutory in origin and raises a question of statutory interpretation to be resolved by the Public Employment Relations Board, an alleged contract violation is proper subject matter only for the negotiated grievance procedure.

The unfair labor practice forum is not a substitute for the grievance procedure and the Public Employment Relations Board has no jurisdiction to resolve grievances through the interpretation of contract language. It may, however, be necessary for the Board to periodically determine the status of specific contractual provisions in order to resolve unfair labor practice issues properly before it.

Section 4002(p) of the Public School Employment Relations Act defines the terms and conditions of employment which constitute mandatory subjects of bargaining. Within these areas neither party is free to unilaterally alter the status quo without first bargaining the matter with the other party, at least to the point of impasse. Brandywine Affiliate, NCCEA/DSEA/NEA v. Board of Education of the Brandywine School District, Del.PERB, U.L.P. No 1-9-84B (November 20, 1984). In order for the Association to sustain its position it must first prove not only a unilateral change in the status quo but also that the change involved a mandatory subject of bargaining. To establish the status quo, the Association relies primarily on paragraph 7:4.2 of the collective bargaining agreement which, it claims, gains its meaning from a long-standing past practice existing in both the New Castle County and the Brandywine School Districts. As the existence of the past practice is of critical importance to the Association's position, it provides an appropriate place to begin.

The mere existence of a course of conduct, without more, has no real significance. Where a practice involves subject matter which is normally considered to be one of inherent managerial policy and therefore reserved to management's discretion, the practice merely

represents the current way of handling a given situation and is not necessarily the prescribed way. The nature of a past practice is such that one must first establish a given course of conduct occurring in response to a specific set of facts. Once this is accomplished, the question becomes whether or not the established course of conduct is sufficient to qualify as a past practice. To do so, several conditions must be present: first, the course of conduct must be clear and unambiguous; secondly, it must involve a period of time sufficient for it to be established on a consistent basis; and thirdly, those involved must have knowledge of the conduct and accept it as the appropriate means of handling the given situation.

The existence of a past practice is usually asserted in order to accomplish one of three things: first, to add an additional contractual requirement beyond that of existing written provisions; secondly, to establish a particular meaning for ambiguous contract language; or thirdly, to actually change the meaning of unambiguous contract language. A practice is most often held to exist where the parties are in substantial agreement as to the existence of the alleged course of conduct. Where agreement is lacking, proof is frequently difficult since the party attempting to establish the existence of the past practice is often forced to rely on vague and/or inconclusive testimony covering an extended period of time and not otherwise substantiated by other relevant evidence, such as pertinent records of the employer.

The Association presented its evidence primarily through the testimony of Mr. Howard Weinberg, UniServ Director for the Delaware State Education Association. Mr. Weinberg, who was directly involved

in the negotiation and administration of the New Castle County collective bargaining agreement, testified that he was not aware of any instances in the New Castle County School District where a nontenured teacher with a performance rating above unsatisfactory had been terminated at year end and not placed on the recall list. However, by his own admission, Mr. Weinberg was only one of several persons who monitored the layoff and recall lists and his testimony was limited in scope to the extent of his personal involvement. Mr. Weinberg also testified that he was not aware of any grievances being filed protesting a deviation from the asserted practice and he interpreted this to mean that no deviations had, in fact, occurred. In support of the existence of the practice in the New Castle County School District this witness also offered hearsay testimony originating from his recent conversations with Mr. Frank Rishel, former Personnel Director for the New Castle County School District. This portion of Mr. Weinberg's testimony was given little weight as, in addition to being hearsay, it was general in nature and unsupported by any relevant documentation. The absence of Mr. Rishel also denied the District its right to cross examine this individual as to the statements attributed to him. No valid reason was offered to indicate that Mr. Rishel's presence was either impossible or would have caused undue hardship to either him or the Association. While the record indicates that an apparent course of conduct did exist in at least a portion of the New Castle County School District, there is no convincing proof that this course of conduct consistently occurred in other areas of the District in which Mr. Weinberg was not directly involved; there, we have only Mr. Weinberg's assumption based on a

lack of grievance activity.

Nor was there any convincing proof offered to establish the District's knowledge of the existence of the alleged practice in the New Castle County District. The Brandywine District was not in apparent position to either know of or acquiesce to a practice occurring in another district prior to its creation on July 1, 1981.

With regard to the alleged continuance of the past practice by the Brandywine School District, the detailed testimony clearly established the nature of the 17 terminations occurring at the end of the 1984-1985 school year and that the only two terminations occurring at the end of the 1983-84 school year were layoffs. Since both of these employees were placed on the recall list the limited fact situation necessary to raise the issue of a non-renewed nontenured teacher not being placed on the recall list did not arise. In sharp contrast to the years 1984-85 and 1983-84, no documentation was submitted and the testimony was sparse and inconclusive concerning the nature and number of terminations of nontenured teachers occurring at the end of either the 1981-82 or 1982-83 school years.

Finally while the alleged current practice in the other three New Castle County school districts may be indicative of the understanding each has reached with its local education association concerning contract language negotiated therein, it has little bearing on the results of the independent contract negotiations conducted in the Brandywine School District. The contention that the Brandywine District continued the alleged practice is simply not supported by the evidence.

It should be noted here that a valid past practice is based on the existence of a limited and specific underlying fact situation, thereby assuring a predictable and consistent result. A close analysis indicates that such is not the case here. The Association offered no testimony or other evidence to establish the existence or nature of a formal performance rating scale in the New Castle County School District. The only reference to such a scale was Mr. Weinberg's referral to a satisfactory as opposed to an unsatisfactory rating. Testimony did, however, clearly define a five tier rating scale in the Brandywine School District, namely: outstanding, commendable, satisfactory, provisional and unsatisfactory. The uncontradicted testimony of Dr. Nardoizzi, District Personnel Director, established that a provisional rating is lower than a satisfactory rating. The admitted result of the Association's position would be the retention of all nontenured teachers rated above unsatisfactory, thus requiring the District to retain the services of those teachers whose performance is rated below satisfactory. It is not apparent from the record that such a result ever occurred in the New Castle County School District or was ever contemplated or intended by either the New Castle County or Brandywine School Districts.

Based on the foregoing analysis, there is no reasonable alternative other than to conclude that the proof offered is insufficient to establish the existence of the required past practice in either the New Castle County or Brandywine School Districts, and the Association has therefore failed to establish the status quo upon which its position is based.

Having so concluded, it is unnecessary to determine whether or not the subject matter of year end terminations of nontenured teachers constitutes a mandatory subject of bargaining. If not, there would be no requirement for the District to maintain the status quo, even during the term of the current contract. While a failure to do so might violate a provision of the collective bargaining agreement, it would not be sufficient to support a charge of failure to bargain in good faith.

ISSUE TWO:

The second portion of the charge concerns the District's refusal to provide the Association with the names of the nontenured teachers who were non-renewed at the end of the 1984-85 school year and who were not placed on the recall list. While the Association addressed this issue in some depth in its opening brief, the District limited its response to footnote 5, page 6 of its answering brief wherein it raises the following defenses:

1. The Association did not need the names of each teacher since the District conceded from the outset that nontenured teachers who were rated satisfactory were terminated and not placed on the recall list and that this was all the information the Association needed to assert its charge.
2. The union had access to the information sought by simply canvassing the teachers to determine who was affected.
3. The Association unsuccessfully sought to negotiate into the contract a requirement that the District discuss the reasons for terminating nontenured teachers and the demand was re-

jected; therefore the union is attempting to now gain that which was denied during the negotiations.

As a general premise, a labor relations statute is remedial in nature and should be liberally construed so as to give effect to all of its provisions. West Hartford Bd. of Education v. Connecticut State Bd. of Labor Relations, Conn.Supr., 460 A.2d 1255 (1983). An express purpose of the Public School Employment Relations Act is to promote harmonious and cooperative relationships between the parties (14 Del.C. sec. 4001); employees are also given a statutory right to negotiate collectively and to grieve through representatives of their own choosing (14 Del.C. sec. 4003(2)); the certified representative assumes a statutory duty to represent all bargaining unit employees without discrimination (14 Del.C. sec. 4004(a)); and, the employer is obligated to disclose any public records as defined by Chapter 100 of Title 29 (14 Del.C. sec. 4007(a)(8)).

Inherent in the collective bargaining and representation process established by the Act are the elements of mutuality and good faith. Neither party can unilaterally determine which disputes are valid and therefore warrant mutual involvement and which disputes are not; nor can either party refuse or fail to fully cooperate in attempting to resolve legitimate differences. The statutory duty of representation necessarily encompasses the right to conduct a reasonable investigation which, if not otherwise privileged, includes access to relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to pursue. The duty to furnish such information extends beyond the negotiations to the day

to day administration of the collective bargaining agreement. To conclude otherwise would render the entire representation process meaningless.

There is little question that the names of the effected teachers, unless otherwise privileged, constitute relevant and necessary information to which the Association is entitled. Although unknown to the Association, the names were both known by and in the possession of the District and could have been provided with little effort or inconvenience. Under these circumstances, to require the Association to attempt to determine for itself the identity of the teachers involved would be unnecessarily burdensome and impede its ability to conduct a thorough investigation and to properly evaluate its position. For these reasons, the District's arguments as set forth in paragraphs #1 and #2, above, are inconsistent with the spirit and purpose of the Act and are dismissed as being without merit.

The third defense asserted by the District involves a demand presented by the Association during the 1985 contract negotiations involving the rights of nontenured teachers whose contracts the District chooses not to renew. The District refers to the Association's proposal as a "fair dismissal article" requiring the reason for the termination of a nontenured teacher and the establishment of a review and appeals procedure. Unfortunately, the District's argument confuses reason, review and appeal with a mere request for the names of the teachers effected. As previously stated, the duty to furnish relevant and necessary information, not otherwise privileged, is a statutory requirement and exists

independent from the demands and positions of the parties during contract negotiations.

The final defense presented by the District goes to the question of privilege by contending that release of the requested names would have violated the State's Freedom of Information Act (29 Del.C. sec. 10002(d)(1)), which states:

(d) "Public record" is written or recorded information made or received by a public body relating to public business. For purposes of this chapter, the following records shall not be deemed public:

(1) Any personnel file, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or Federal law as it relates to privacy;

The Freedom of Information Act is intended to protect the right of the general public to be advised of the performance and decisions of public officials. Section 10002(d)(1) balances this right with the need to protect personal privacy. A certified exclusive bargaining representative, in fulfilling its statutory duty to represent the members of a certified bargaining unit, cannot be considered in the same class as the general public, the body to which the exclusions of sec. 10002(d)(1) are directed. Under the State's tenure law, the District is required to give timely notice to nontenured teachers who are terminated at the end of the school year. 14 Del.C. sec. 1410. Likewise, the Public School Employment Relations Act entitles the certified exclusive bargaining representative, upon request, to the names of the teachers so effected. This result is neither prohibited

by nor inconsistent with the personal privacy protections of the Freedom of Information Act.

After considering the arguments of the parties, it is determined that the identity of the nontenured teachers is relevant and necessary information to which the Association is entitled. The District's refusal to provide it, upon request, is not excused by either the demands of the Association during contract negotiations or by the privacy protections of section 10002(d)(1) of the Freedom of Information Act.

CONCLUSIONS OF LAW

1. The Brandywine School District is a Public School Employer within the meaning of 14 Del.C. sec. 4002(m).
2. The Brandywine Affiliate, NCCEA/DSEA/NEA is an Employee Organization within the meaning of 14 Del.C. sec. 4002 (g).
3. The Brandywine Affiliate, NCCEA/DSEA/NEA is the Exclusive Bargaining Representative of the certificated professional employees of the Brandywine School District within the meaning of 14 Del.C. sec. 4002(j).
4. There is insufficient proof to establish the existence of a past practice in either the New Castle County or Brandywine School Districts requiring that a nontenured teacher who is terminated at the end of the school year and who received a performance rating above unsatisfactory be placed on the recall list.
5. The decision of the Brandywine School District not to renew 17 nontenured teachers at the end of the 1984-85 school year and not to place these teachers on the recall list despite their

receiving annual performance ratings above unsatisfactory is a proper exercise of its discretion under 14 Del.C. section 1401 et seq.

6. Therefore, by engaging in the conduct as set forth in paragraph 5 above, the Brandywine School District did not engage nor is it currently engaging in conduct which constitutes a violation of sections 4007 (a)(1), (3), (5) and (8) of the Act.
7. The individual names of the 17 nontenured teachers whose contracts were not renewed at the end of the 1984-85 school year and who were not placed on the recall list despite their receiving annual performance ratings above unsatisfactory constitutes information to which the exclusive bargaining representative is entitled, upon request.
8. The refusal of the Brandywine School District to provide the Association with the names of the group of teachers set forth in paragraph 7 above, does not constitute conduct in violation of section 4007(a)(1) of the Act, as there is insufficient evidence on the record to warrant a finding that the District interfered with, restrained or coerced any employee in or because of the existence of any right guaranteed under the Act.
9. The refusal of the Brandywine School District to provide the Association with the names of the group of teachers set forth in paragraph 7, above, does not constitute conduct in violation of section 4007(a)(3) of the Act, as there is insufficient evidence on the record to warrant a finding that the District encouraged or discouraged membership in any employee organization by discriminating in regard to hiring, tenure or other terms and condi-

tions of employment.

10. The refusal of the Brandywine School District to provide the Association with the names of the group of teachers set forth in paragraph 7, above, does constitute conduct in violation of section 4007(a)(5) of the Act, as there is sufficient evidence on the record to warrant a finding that the District refused to bargain collectively with an employee representative which is the exclusive representative of the employees in an appropriate unit.
11. The refusal of the Brandywine School District to provide the Association with the names of the group of teachers set forth in paragraph 7, above, does constitute conduct in violation of section 4007(a)(8) of the Act, as there is sufficient evidence on the record to warrant a finding that the District did refuse to disclose public records as defined by Chapter 100 of Title 29.

REMEDY

PURSUANT TO 14 DEL.C. SECTION 4006(h), THE BOARD OF EDUCATION OF THE BRANDYWINE SCHOOL DISTRICT IS ORDERED TO:

A. Cease and desist from:

1. refusing to provide, upon request, relevant information necessary for the Association to properly fulfill its statutory duty as the exclusive bargaining representative.

B. Take the following Affirmative Action:

1. provide the Association, in writing, with the names of the nontenured teachers whose contracts were not renewed at the end of the 1984-85 school and who were not placed on the recall list. **

2. Within ten (10) calendar days from the date of this decision, post a copy of the attached Notice of Determination in each school at the place where notices of general interest to teachers are normally posted. The Notice shall remain posted for a period of thirty (30) consecutive calendar days.
3. Notify the Public Employment Relations Board, in writing, within thirty (30) calendar days from the date of this Order of the the steps taken to comply with the provisions contained therein.

IT IS SO ORDERED.

FEBRUARY 5. 1986
DATE

Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Delaware Public Employment
Relations Board

